

A Lafarge Concrete (M) Sdn Bhd v Gold Trend Builders Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02-255
OF 2010

B SURIYADI, JEFFREY TANAND ALIZATUL KHAIR JJCA
28 APRIL 2011

C *Companies and Corporations — Winding up — Petition under s 218 — Debt disputed — Whether there was bona fide dispute as to debt — Whether sum claimed in petition true and correct — Whether respondent was ready, willing and able to meet appellant's demand — Companies Act 1965 s 218*

D The appellants claimed that it had sold and delivered goods to the sum of RM50,000 to the respondent and that the latter had failed to settle the price of the goods ('the debt'). The respondent proposed to settle the debt of RM53,701.65, ie principal of RM50,000 plus accrued interest of RM3,701.65, in eight installments. The appellant accepted the proposed settlement but counter proposed a further term, namely the imposition of interest until final payment of the debt. The respondent accepted those terms but defaulted in the payment of the third installment. When the appellant issued a s 218 notice demanding repayment of the debt, the respondent belatedly paid the third installment, which the appellant acknowledged.

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F However, in the meantime the appellant had presented a winding up petition against the respondent, founded on the latter's alleged inability to pay its debt to the appellant. The petition had stated that the debt due and owing was RM36,574.58 with accrued interest of RM7,302.08 without reflecting the payment of the third installment, which payment had reduced the outstanding debt to RM29,861.87. The respondent resisted the petition on, inter alia, the grounds that the s 218 notice was bad because the computation of the debt and interest was wrong and the said notice premature as the settlement had not been terminated. The trial judge found that in view of the settlement, it was doubtful as to whether the debt as stated in the petition was due and that on the whole the appellant had failed to make out a strong case for winding up. This was the appellant's appeal against the dismissal of its petition to wind up the respondent company. Before this court the respondent contended that there was a bona fide dispute as to the debt and that the court below was correct in its findings.

I **Held**, allowing the appeal with costs:

- (1) Based on the evidence there was no doubt as to the respondent's liability to the appellant. In fact, if at all the respondent had only confirmed that the debt was true and due. From the start the respondent had admitted

that the total debt was RM53,701.65 and that it had paid three of the eight installments by which it had proposed to settle the debt. This meant that the actual sum due and owing to the appellant after the payment of the third installment was RM29,861.87 and this was the amount claimed by the appellant in its amended winding up petition. The other claim was for RM7,302.08, for interest accrued up till that moment, which also could not be disputed. As such, the ultimate sum of RM37,163.95 (RM29,861.87+ RM7,302.08) was true and correct and there was no bona fide dispute as to that debt. Thus, it was a bare allegation that there was a dispute as to the debt and in the circumstances there was no question or issue to be tried (see paras 11 & 18).

- (2) There was also no question that by the time the appellant issued the s 218 notice, all installments were already overdue, by reason of the effluxion of time and not by reason of any default of payment of any one installment. The time granted by the appellant for payment by installments had passed, so the appellant was entitled to issue the s 218 notice to demand for payment of the then six overdue installments and agreed interest. Acceptance of the third installment after issuance of the s 218 notice was of no consequence as the correct amount was claimed (see para 12).
- (3) From the evidence of the respondent's banking statements it was clear that the respondent had no funds to meet the demand of the appellant at the material time. In those circumstances, the refusal of the winding up order was wholly unjust for it altogether deprived the appellant of the remedy conferred by statute. In any case, the winding up order should have been made even if the respondent was solvent because where a creditor's debt was clearly established that creditor had the right to present a winding up petition and obtain relief even though the company was solvent. The respondent was not ready, willing and able to meet the demand of the appellant and winding up should have been the foregone conclusion. It was thus ordered that the respondent company be wound up under the provisions of the Companies Act and that the official receiver be appointed for the purpose of the winding up (see paras 19–20).

[Bahasa Malaysia summary]

Perayu mendakwa bahawa ia telah menjual dan menghantar barangan berjumlah sebanyak RM50,000 kepada responden dan responden telah gagal untuk menyelesaikan harga barangan tersebut ('hutang'). Responden mencadangkan untuk menyelesaikan hutang sebanyak RM53,701.65, iaitu prinsipal sebanyak RM50,000 ditambah dengan faedah terakru sebanyak RM3,701.65, dalam lapan ansuran. Perayu menerima cadangan penyelesaian tetapi mencadangkan terma lanjut, iaitu pengenaan faedah sehingga pembayaran akhir hutang. Responden menerima terma-terma tersebut tetapi gagal dalam pembayaran ansuran ketiga. Apabila perayu mengeluarkan notis

- A s 218 bagi menuntut pembayaran balik hutang, responden lewat dalam membayar ansuran ketiga, yang diakui oleh perayu. Walau bagaimanapun, dalam masa yang sama perayu telah menyampaikan petisyen penggulungan terhadap responden, yang berasaskan pada dakwaan ketidakupayaan responden untuk membayar hutang kepada perayu. Petisyen tersebut telah
- B menyatakan bahawa hutang yang perlu dibayar dan terhutang adalah RM36,574.58 dengan faedah terakru sebanyak RM7,302.08 tanpa menunjukkan pembayaran ansuran ketiga, yang mana pembayarannya telah mengurangkan hutang kepada RM29,861.87. Responden menentang petisyen tersebut atas alasan, antara lain, bahawa notis s 218 adalah lapuk
- C kerana pengiraan hutang dan faedah adalah salah dan notis tersebut adalah pra-matang kerana penyelesaian belum lagi ditamatkan. Hakim bicara memutuskan mengenai penyelesaian, bahawa adalah diragui mengenai sama ada hutang seperti yang dinyatakan dalam petisyen tersebut adalah yang perlu dibayar dan bahawa pada keseluruhannya, perayu telah gagal untuk
- D membentuk suatu kes yang kukuh bagi penggulungan. Ini adalah rayuan perayu terhadap penolakan petisyen untuk menggulung syarikat responden. Di hadapan mahkamah, responden menghujahkan bahawa terdapat pertikaian bona fide mengenai hutang dan bahawa mahkamah di bawah adalah betul dalam keputusannya.

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Diputuskan, membenarkan rayuan dengan kos:

- (1) Berdasarkan bukti, tiada syak lagi berkenaan liabiliti perayu kepada responden. Malah, jika responden hanya mengesahkan bahawa hutang tersebut adalah benar dan tertunggak. Dari awal lagi, responden telah
- F mengakui bahawa jumlah hutang adalah RM53,701.65 dan bahawa ia telah membayar tiga daripada lapan ansuran yang telah dicadangkannya untuk menyelesaikan hutang tersebut. Ini bermakna bahawa jumlah
- G sebenar yang perlu dibayar dan terhutang kepada perayu selepas pembayaran ansuran ketiga ialah RM29,861.87 dan ini adalah jumlah yang dituntut oleh perayu dalam petisyen penggulungan yang dipinda. Tuntutan lain adalah untuk RM7,302.08 bagi faedah terakru sehingga
- H ketika itu, yang juga tidak boleh dipertikaikan. Oleh itu, jumlah muktamad RM37,163.95 (RM29,861.87 + RM7,302.08) adalah benar dan betul dan tiada pertikaian bona fide tentang hutang tersebut. Oleh itu, ia adalah dakwaan kosong bahawa terdapat pertikaian tentang hutang dan dalam hal keadaan ini, tidak ada persoalan atau isu untuk
- I dibicarakan (lihat perenggan 11 & 18).
- (2) Tiada juga persoalan bahawa sebaik sahaja perayu mengeluarkan notis s 218, kesemua ansuran sudah pun terlewat, oleh sebab keluputan masa dan bukan oleh apa-apa sebab keingkaran pembayaran salah satu daripada ansuran. Masa yang diberikan oleh perayu untuk pembayaran secara ansuran telah berlalu, oleh itu perayu berhak untuk mengeluarkan notis s 218 untuk menuntut enam pembayaran ansuran yang perlu

dibayar dan faedah yang dipersetujui. Penerimaan ansuran ketiga selepas pengeluaran notis s 218 bukanlah natijahnya kerana amaun yang betul telah pun dituntut (lihat perenggan 12).

- (3) Berdasarkan bukti penyata bank responden, adalah jelas bahawa responden tidak mempunyai dana untuk memenuhi permintaan perayu pada masa material. Dalam keadaan tersebut, keengganan perintah penggulungan adalah secara keseluruhannya tidak adil kerana ia sama sekali menafikan perayu akan remedi yang diperuntukkan oleh undang-undang. Dalam apa jua kes, perintah penggulungan telah dibuat walaupun responden adalah solven kerana hutang pemiutang telah membuktikan dengan jelas bahawa pemiutang mempunyai hak untuk membentangkan petisyen penggulungan dan mendapatkan bantuan walaupun syarikat tersebut adalah solven. Responden tidak bersedia, tidak sanggup dan tidak mampu untuk memenuhi permintaan perayu dan penggulungan sepatutnya menjadi kesimpulan yang dibuat. Oleh itu diperintahkan bahawa syarikat responden digulung di bawah peruntukan-peruntukan Akta Syarikat dan bahawa pegawai penerima dilantik bagi maksud penggulungan (lihat perenggan 19 & 20).]

Notes

For cases on petition under s 218, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1668–1672.

Cases referred to

- BMC Construction Sdn Bhd v Dataran Rentas Sdn Bhd* [2001] 1 MLJ 356, HC (refd)
- Bowes v Hope Life Insurance Society Ltd* (1865) 11 HLC 389, HL (refd)
- Cornhill Insurance plc v Improvement Services Ltd and ors* [1986] 1 WLR 114, HC (refd)
- Genting Sanyen Industrial Paper Sdn Bhd v WWL Corrugators Sdn Bhd* [2000] 5 MLJ 33; [2000] 1 CLJ 27, HC (refd)
- Hotel Royal Ltd Bhd v Tina Travel & Agencies Sdn Bhd* [1990] 1 MLJ 21, HC (refd)
- Imperial Hydropathic Hotel Company, Blackpool, The v Hampson, Re* (1882) 23 Ch D 1; [1883] 49 LT 147, CA (refd)
- Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & ors and another application* [1994] 2 MLJ 789, HC (refd)
- Lian Keow Sdn Bhd (In Liquidation) & anor v Overseas Credit Finance (M) Sdn Bhd* [1988] 2 MLJ 449, SC (refd)
- Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd* [1980] 2 MLJ 53, PC (refd)
- Mann v Goldstein* [1968] 1 WLR 1091, HC (refd)
- Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1992] 1 MLJ 313; [1992] 1 CLJ 637; [1992] 1 CLJ 303 (Rep), SC (refd)

- A** *Sunshine Securities (Pte) Ltd; Sunshine Securities (Pte) Ltd & anor v Official Receiver and Liquidator of Mosbert Acceptance Ltd, Re* [1978] 1 MLJ 57, CA (refd)
- System Communication Engineering Sdn Bhd v Zabidin Sdn Bhd* [1999] MLJU 55; [1999] 1 AMR 1187, HC (refd)
- B** *YPJE Consultancy Service Sdn Bhd v Heller Factoring (M) Sdn Bhd (formerly known as Matang Factoring Sdn Bhd)* [1996] 2 MLJ 482; [1996] 3 CLJ 51, CA (refd)

Legislation referred to

- C** Companies Act 1965 s 218, 218, (1)(a), (e), (i), (2)(a)
- Ng Keen Leong (Soon Sheau Wen with him) (Shui-Tai) for the appellant.*
Lincoln Hoo (Lin Coin & Co) for the respondent.

D Jeffrey Tan JCA (delivering judgment of the court):

- E** [1] This is an appeal against the dismissal of the appellant's petition to wind up the respondent company pursuant to the provisions of s 218(1)(e) and (i) of the Companies Act 1965 ('CA'), which read as follows:

218 Circumstances in which company may be wound up by Court

- (1) The Court may order the winding up if —
- F** ...
- (e) the company is unable to pay its debts;
- ...
- (i) the Court is of opinion that it is just an equitable that the company be wound up;
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- H** [2] That petition was founded on the alleged inability of the respondent to pay its debt to the appellant. By letter dated 1 August 2007, the respondent proposed to settle its debt of RM53,701.65 (it being, RM50,000 as principal, and RM3,701.65 as accrued interest) in eight instalments (see p 57 of the appeal record). On the same day, the appellant accepted that proposal but counter-proposed a further term — the imposition of interest until full payment of the debt (see 58AR). By letter dated 12 August 2007, the respondent accepted those terms of the appellant and forwarded the first instalment to the appellant (see 59AR). By the terms of the settlement, those eight instalments were payable in eight consecutive months, the first of which was payable in July 2007. The respondent defaulted on the payment of the instalments. On 8 April 2008, the appellant issued a s 218 notice on the respondent (see 64AR). On 20 August 2008, the respondent belatedly paid the
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third instalment (see 126AR), which the appellant acknowledged on 18 September 2008 (see 233AR). Meantime, on 2 September 2008, the appellant had presented the said petition which stated that the debt was RM36,574.58 for goods sold and delivered, and that the accrued interest was RM7,302.08 as at 3 April 2008. Later, by affidavit dated 17 October 2008, the appellant corrected the petition to reflect the payment of the third instalment which had reduced the outstanding debt for goods sold and delivered, from RM36,574.58 to RM29,861.87.

[3] In the court below, the respondent resisted the petition on the following grounds: (i) the s 218 notice was bad, for reason that the computation of the debt and interest was wrong; (ii) the s 218 notice was premature, as the settlement had not been terminated; and (iii) the respondent was solvent on 31 December 2006, as its current assets exceeded its current liabilities.

[4] And those grounds found favour with the court below which approached the petition, first with the general remark that ‘the discretion whether to make an order for winding-up lies with the court ... a strong case has to be made out before the court will grant a petition’, and then with the findings (i) that in view of the settlement, it was doubtful as to whether the debt as stated in the petition was due (see 24AR), (ii) that the debt was disputed and that therefore there was a reasonable explanation for non-payment (see 21AR and 24AR), (iii) that the settlement remained in force even after issuance of the s 218 notice (see 24AR), (iv) that the respondent was an ongoing and solvent company (see 24AR), (v) that the respondent was able to meet the terms of settlement, though late, and any delay in payment could be covered by the imposition of interest (see 25AR), and (vi) that a strong case for winding up had not been made out (see 24AR).

[5] Before us, it was again contended by the respondent that there was a bona fide dispute as to the debt. The finding of the court below was that there was a bona fide dispute as to the debt. But it was also at the same time the finding of the court below that the debt was agreed to be settled by eight instalments (see 22AR) and that the respondent had only paid three instalments (see 22AR). If that were so, then what could have been in dispute? Having regard to the clear and unequivocal admission of the debt in 59AR, was the court below entitled to come to the conclusion that there was a bona fide dispute? (see *Re Sunshine Securities (Pte) Ltd; Sunshine Securities (Pte) Ltd & anor v Official Receiver and Liquidator of Mosbert Acceptance Ltd* [1978] 1 MLJ 57, where it was held by the Court of Appeal of Singapore that given the clear and unequivocal admission of the debt, the trial judge was entitled to conclude that there was no bona fide dispute). Could the finding of bona fide dispute stand up to scrutiny?

[6] Before we proceed to answer those questions, we should perhaps say that

- A 'a creditor is not required to obtain a judgment before serving a statutory demand ...' (*The Law of Company Liquidation* (4th Ed), by Andrew R Keay at p 83) and 'whether or not judgment had been obtained, an unpaid creditor is, as a general rule, entitled to a winding-up order against a company which is insolvent' (*The Law of Company Liquidation* (4th Ed), by Andrew R Keay at p 91). Where there is no judgment, it is not uncommon for companies to argue that the debt is disputed. But 'in order to oppose a winding up petition, the respondent must raise a bona fide dispute in both a subjective and objective sense. It must be honestly believed to exist and must be based on substantial or reasonable grounds — *BMC Construction Sdn Bhd v Dataran Rentas Sdn Bhd* [2001] 1 MLJ 356' (*Chan & Koh on Malaysian Company Law* (2nd Ed), at para 22.145).

D [7] In *BMC Construction Sdn Bhd v Dataran Rentas Sdn Bhd*, the respondent opposed the winding up petition on the ground that it had a cross-claim or set-off against the petitioner for defective works. The respondent also produced letters from its bankers to substantiate that it was solvent and had the means to settle the claim of the petitioner. On what constitutes a bona fide dispute, the court first surveyed the law and then summarised it as follows:

- E The respondent's point of view is that a dispute automatically arises whenever there are opposing assertions. Perhaps it is true, that whenever there are opposing assertions, there is no agreement on the matters diametrically asserted. Perhaps, in that sense of argument, debate or controversy, it is true that there is dispute whenever there are opposing assertions. But it is patently not true that a bona fide dispute automatically arises whenever there are opposing assertions. For whether or not there is a bona fide dispute wholly depends upon the evidence (see *Chip Yew Brick Works Sdn Bhd v Chang Heer Enterprise Sdn Bhd* [1988] 1 CLJ 5). 'The debt must be disputed on some substantial grounds' (*Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd* [1986] 2 MLJ 374, 376; [1991] 1 CLJ 260; [1991] 1 CLJ 317 (Rep) [1991] 1 MLJ 95, 97 per Hashim Yeop A Sani CJ). The facts must indicate that there is a substantial dispute (*Re Nima Travel Sdn Bhd*). '... it is not sufficient ... to say 'we dispute the claim'. (The respondent) must bring forward a prima facie case which satisfies the court that there is something to be tried, either before the court itself, or in an action, or by some other proceeding' (*Re Great Britain Mutual Life Assurance Society* [1880] 16 Ch D 246, 253 per Jessel MR). 'Dispute means not just differences arising out of a party's refusal to do something but controversy over contestable matters. Mere refusal to pay is not a dispute. See the cases of *Elf Petroleum SE Asia Pte Ltd v Winelf Petroleum Sdn Bhd* [1986] 1 MLJ 177; [1984] 1 LNS 166 and *KSM Insurance v Ong Ah Ba & Anor* [1986] 1 MLJ 237; [1984] 1 LNS 147, both decisions by George J, (as he then was)' (*Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mills Sdn Bhd* [1991] 3 CLJ 2400, ; [1991] 1 CLJ 362 (Rep), per Hashim Yeop A Sani CJ, and cited in *Tan Kok Cheng & Sons Realty Co Sdn Bhd v Urn Ah Pat* [1996] 1 CLJ 231, 236). 'The dispute must be bona fide in both a subjective and objective sense. Thus it must be honestly believed to exist and must be based on substantial or reasonable grounds. Substantial means having substance and not frivolous and which the court should

therefore ignore' (*Palmer's Company Law* (23th Ed), p 1117; see also *Salak Park Development Sdn Bhd v Fajar Menyensing Sdn Bhd* [1994] 4 CLJ 580). To just say 'we dispute the claim', is most definitely not enough.

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[8] 'Obviously a bare allegation by the company that a dispute exists cannot be allowed to deprive a creditor of the remedy which the statute confers on her or him ... It is, of course, impossible to predict in advance precisely what will constitute a 'substantial' ground but a suggested test is that there must be 'so much doubt and question about the liability to pay the debt as that the court see there is a question to be decided' or in the words of Sir George Jessel, the duty of a company to 'bring forward a prima facie case which satisfies the court that there is something to be tried' ... Whether there is in fact ground for the dispute depends upon the evidence ...' (*The Law of Company Liquidation* (4th Ed), by Andrew R Keay at p 99). 'Where there is a bona fide dispute as to the debt, the company cannot be said to have neglected to pay on a statutory notice' (*Palmer's Company Law* (23rd Ed), at p 1117), and a petition based on a debt which is disputed on substantial grounds will fail (see *Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & ors and another application* [1994] 2 MLJ 789). 'Where the company disputes the debt in good faith and on reasonable grounds, the court will not make a winding up order ... [However] It is not satisfactory for the company simply to claim that it has a defence to the creditor's claim; it must show that it has a viable defence in law and produce prima facie proof of the facts to which it relies ... If there is no genuine dispute the court will make an order' (*Corporate Insolvency, Law and Practice* (2nd Ed), by Bailey, Groves and Smith at p 7.97).

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[9] The making of a winding up order is not entirely a discretionary matter once a debt is established and not satisfied. 'One does not like to say positively that no case could occur in which it would be right to refuse it, but ordinarily speaking, it is the duty of the court to direct a winding up' (*Bowes v Hope Life Insurance Society Ltd* (1865) 11 HLC 389 per Lord Cranworth). There is however authority for the proposition that Lord Cranworth's principle had been too widely stated (see *The Law of Company Liquidation* (4th Ed), by Andrew R Keay at p 92). Since our s 218 provides that the court 'may order a winding up of a company', the discretion whether to make an order for winding up lies with the court. Such discretion is however not unbridled. In *Genting Sanyen Industrial Paper Sdn Bhd v WWL Corrugators Sdn Bhd* [2000] 5 MLJ 33; [2000] 1 CLJ 27, Clement Skinner JC, as he then was, balanced the two sides as follows:

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The submission that there is an overriding discretion reposed in the court is well supported by authority because whilst it is accepted that as between a creditor and a company as his debtor, the creditor who proves insolvency is prima facie entitled to a winding-up order, (see the judgment of Buckley J at p 331 in *Re Crigglestone Coal Co Ltd* [1906] 2 Ch 327) there are numerous cases, both local and

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A Commonwealth, in which the overriding discretion of the court to refuse a winding up is recognised, (see *Kim Wah Theatre Sdn Bhd v Fuhlum Development Sdn Bhd* [1990] 2 MLJ 511; *Cetico Sdn Bhd v The Tropical Veneer Co Bhd* [1987] CLJ 511; *Re P & J Macrae Ltd* [1961] 1 All ER 302).

B However ... the overriding discretion of the court, like any other judicial discretion, is fairly strictly regulated and is exercised in accordance with principles that are well defined. Counsel referred to *The Law of Company Liquidation*, (3rd Ed), by J O' Donovan at p 61 where the author discusses the discretion of the court in these terms:

C Its power to refuse an order is, however, fairly strictly regulated and is exercised in accordance with principles that are relatively well defined. There are, in fact, certainly no more than five, and probably only four, reasons which will justify the court in refusing to make an order on the application of an unpaid creditor.

D These are (1) the applicant's debt amounts to less than \$1,000; (2) the debt is bona fide disputed by the company; (3) the company has paid or tendered payment of applicant's debt; (4) winding-up is opposed by other creditors;.

[10] In its affidavit affirmed on 31 December 2008 (see 127–132AR), the respondent contended (i) that the respondent was not indebted to the appellant in the sum of RM43,876.66 (see 128AR at para 5), (ii) that the s 218 notice was premature by reason of the settlement which gave eight months to the respondent to settle the debt of RM53,701.65 (see 128AR at para 6), (iii) that the respondent had paid three instalments of RM6,712.71 (see 128–129AR, at paras 7–9), (iv) that there was no notice of termination of the settlement (see 129AR at para 10), (v) that the appellant readily accepted the third instalment after issuance of the s 218 notice (see 129AR at para 11), (v) that the s 218 notice was therefore bad and could not terminate the settlement (see 129AR at para 12), and (vi) that the amount of debt as stated in the petition was wrong and therefore had no legal effect (see 129AR at para 13).

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G And on the matter of its solvency, the respondent contended that it had unappropriated profits of RM2,759,276 for the year ended 31 December 2006 (see 132AR at para 26).

[11] But with respect, we do not see how the respondent, by that affidavit, could have raised a doubt or question on the liability of the respondent to the appellant. If at all, the respondent only confirmed that the debt was true and due. To take it from the start, at 128AR and 130AR (paras 6 and 14), the respondent admitted that the total debt was RM53,701.65 (RM50,000 plus RM3,701.65). At 128–129AR (paras 7–9), the respondent admitted that only three instalments (a total of RM20,138.13) had been paid. In other words, the respondent admitted that five instalments had not been paid. And at 129AR (para 11), the respondent admitted that the third instalment was only paid after issuance of the s 218 notice. When it was issued, the petition stated that the outstanding debt was RM36,574.58 for goods sold and delivered, and

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RM7,302.08 for accrued interest, as it stood at 3 April 2007. But by affidavit dated 17 October 2008, the petition was corrected to reflect the payment of the third instalment which had reduced the outstanding debt from RM36,574.58–RM29,861.87 for goods sold and delivered (see 126AR). After the correction, the petition only claimed RM29,861.87 for goods and sold and delivered. And that debt for goods sold and delivered could not be disputed. The respondent admitted that the principal sum was RM50,000. Payment of three instalments (or RM20,138.13) left a balance of RM29,861.87, which was the exact sum claimed for goods and sold and delivered. The other claim was for RM7,302.08, for interest accrued up till 3 April 2008. The total claim of the appellant was therefore made up of RM29,861.87, which could not be disputed, and RM7,302.08, which as the agreed interest could also not be disputed. The total claim was for RM37,163.95. There was simply no basis to say that the appellant claimed RM43,876.66. Based on admitted sums and figures, the ultimate sum of RM37,163.95 was true and correct. There was no bona fide dispute as to that debt. It could not be to the contrary. The three instalments were fully credited. The claimed interest was for that period up till 3 April 2008. Since interest was not claimed for the period after 3 April 2008, it was absurd to argue that the payment of the third instalment on 20 August 2008 affected the computation of the interest.

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[12] There was also no question that the debt of RM37,163.95 was due, albeit that the settlement gave eight months to the respondent to settle the debt. The first instalment fell due in July 2007 and the eighth and last instalment fell due in February 2008. Hence, by the time the appellant issued the s 218 notice in April 2008, all instalments were already overdue, by reason of the effluxion of time and not by reason of any default of payment of any one instalment. With respect, the issue of prior termination of the settlement was an absolute red herring. The time granted by the appellant for payment by instalments had passed. And when that had passed, the appellant was more than entitled to issue the s 218 notice in April 2008, to demand for payment of the then six overdue instalments and agreed interest. Acceptance of the third instalment after issuance of the s 218 notice was of no consequence, as the correct amount was claimed. If at all, the payment of only the third instalment but not the entire debt proved that the respondent was unable to pay its debt to the appellant.

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[13] The appellant's demand for payment of a sum that far exceeded RM500 was not met within three weeks (see *YPJE Consultancy Service Sdn Bhd v Heller Factoring (M) Sdn Bhd (formerly known as Matang Factoring Sdn Bhd)* [1996] 2 MLJ 482; [1996] 3 CLJ 51,60). There was no legitimate reason for the respondent to withhold payment. The requirements of s 218(2)(a) of the CA had been met. Pursuant to s 218(2)(a) of the CA, the respondent 'shall be deemed to be unable to pay its debts'. '... the presumption of insolvency ...

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- A arises if the requirements of the section relating to the demand have been complied with' (*Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1992] 1 MLJ 313; [1992] 1 CLJ 637; [1992] 1 CLJ 303 (Rep) per Gunn Chit Tuan SCJ, as he then was). Without any bona fide dispute, 'it is for the respondent to prove that it is able to pay its debts' (*Sri Hartamas* at p 641).
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- C [14] The respondent asserted that it had unappropriated profits of RM2,759,276 for the year ended 31 December 2006. Perhaps the finances of the respondent were in the pink of health in 2006. But the finances of the respondent must have turned for the worse in 2007, for on 20 July 2007 the respondent informed the appellant that it 'was facing, severe cash flow problems and ... [was] ... restructuring its finances' and that it could only pay RM3,701.65 to the appellant (see 55AR). So, by July 2007, the respondent could not even pay what was a paltry sum of RM37,163.95 in comparison to the alleged unappropriated profits, and was unable to meet the current demand upon it.
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- E [15] The ability of a company to meet current demands upon it goes to the solvency or otherwise of a company. In *Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd* [1980] 2 MLJ 53, the Privy Council opined that the following observations in Buckley on the *Companies Act*, (13th Ed), at p 460, dealing with 'commercial insolvency, that is, of the company being unable to meet current demands upon it', were impeccable:
- F In such a case it is useless to say that if its assets are realized there will be ample to pay twenty shillings in the pound: this is not the test. A company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realizable; but although this be so, yet if it have not assets available to meet its current liabilities it is commercially insolvent and may be wound up.
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- H [16] In *Hotel Royal Ltd Bhd v Tina Travel & Agencies Sdn Bhd* [1990] 1 MLJ 21, Siti Norma Yaakob J, as she then was, pointed out that the scope or the meaning to be given to the phrase 'unable to pay its debts' appearing in s 218(1)(e) of the CA was explained by McPherson J in *The Law of Company Liquidation* (3rd Ed), at p 54 as follows:
- I The phrase 'unable to pay its debts' is susceptible to two interpretations. One meaning which may properly be attached to it is that a company is unable to pay its debts if it is shown to be financially insolvent in the sense that its liabilities exceed its assets. But to require proof of this in every case would impose upon an applicant the often impossible task of establishing the true financial position of the company, and the weight of authority undoubtedly supports the view that the primary meaning to the phrase is insolvency in the commercial sense — that is inability to meet current demands irrespective of whether the company is possessed of assets which, if realised, would enable it to discharge its liabilities in full.

[17] 'In short, the question is not whether the debtor's assets exceed his liabilities as appeared in the books of the debtor, but whether there are moneys presently available to the debtor, or which he is able to realise in time, to meet the debts as they become due. It is not sufficient that the assets might be realisable at some future date after the debts have become due and payable' (*Lian Keow Sdn Bhd (In Liquidation) & anor v Overseas Credit Finance (M) Sdn Bhd* [1988] 2 MLJ 449, 454, per Seah SCJ). 'The test of commercial insolvency simply means that the respondent company is unable to meet current debts as they fall due' (*System Communication Engineering Sdn Bhd v Zabidin Sdn Bhd* [1999] MLJU 55; [1999] 1 AMR 1187 per Abdul Malik Ishak J, as he then was). '... the test for the insolvency of the respondent does not depend on the presence of their realisable assets' (*Hotel Royal Ltd Bhd v Tina Travel & Agencies Sdn Bhd*).

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[18] It was a bare allegation that there was a dispute. On the evidence, there was no doubt about the liability of the respondent, and there was no question or issue to be decided and or tried.

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[19] The respondent who could not meet the current demand of the appellant was insolvent. The respondent produced its banking statements for the period August 2008–December 2008 (see 180–188AR) to substantiate that it was a going concern. But those banking statements only substantiated that the respondent had no funds to meet the demand of the appellant at the material time. Even when the petition was heard in 2009, there was still no evidence that the respondent had the funds and would meet the demand of the appellant. In those circumstances, the refusal of the winding up order was wholly unjust, for it altogether deprived the appellant of the remedy conferred by statute. All said, the winding up order should have been made.

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[20] The winding up order should have been made even if the respondent was solvent (*Cornhill Insurance plc v Improvement Services Ltd and ors* [1986] 1 WLR 114, where it was held by Harman J that where a creditor's debt is clearly established, then the creditor has the right to present a winding up petition and obtain relief even though the company was solvent). 'Where the creditor's debt is clearly established it seems to me to follow that this court would not, in general, at any rate, interfere though the company would appear to be solvent ... to persist in non-payment ... would itself either suggest inability or that the application was an application that the court should give the debtor relief which it itself could provide, but would not provide, by paying the debt' (*Mann v Goldstein* [1968] 1 WLR 1091 per Ungood-Thomas J). The solvency of a company counts for nothing if it is not ready, willing and able to meet the demand of the creditor. The discretion to refuse winding up could be exercised if the respondent was ready, willing and able to meet the demand of the appellant (see *Imperial Hydropathic Hotel Company, Blackpool, The v Hampson*,

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A *Re* (1882) 23 Ch D 1; [1883] 49 LT 147, 151, where the company was solvent and the creditor accepted the proposal to pay the debt within one month, the Court of Appeal (Jessel MR, Cotton and Bowen UJ) ordered the debt to be paid within one month, in default of which ‘there will be the usual winding up order’. But it was not that in the instant case.

B [21] There was no genuine dispute. The respondent was insolvent. The respondent was not ready, willing and able to meet the demand. Winding up should have been the foregone conclusion.

C [22] For the aforesaid reasons, we unanimously allow this appeal with costs in the sum of RM20,000. We further order that the respondent be wound up under the provisions of the CA, that the official receiver be appointed the provisional liquidator for the purpose of the said winding up, and that the aforesaid costs of RM20,000 and the costs of the petition, which is to be taxed, be paid to the appellant out of the assets (if any) of the respondent.

Appeal allowed with costs.

E Reported by Kohila Nesan

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